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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 408

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, COMMISSIONER OF FINANCE AND TAXATION OF TENNESSEE AND ROY H. BEELER, ATTORNEY GENERAL OF TENNESSEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION

CHARLES C. MOORE,
Counsel for Appellant.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PENN-DIXIE CEMENT CORPORATION,

vs.

J. M. DICKINSON, SUCCESSOR OF JOHN F. KIZER, COMM'R. ETC.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN THE ABOVE STYLED CAUSE

The Complainant Appellant, having presented this day its petition for appeal, now files this, its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the judgment or decree in question, and should exercise such jurisdiction in this case.

(a) The Statutory Provisions Believed to Sustain the Jurisdiction

This appeal is prosecuted from the final judgment of the highest Court of the State of Tennessee in which a decision in the suit could be had. In this suit there was drawn in question the validity of Chapter 6, Acts of 1951, of the General Assembly of Tennessee on the ground that the

same was repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of said Act. Hence, jurisdiction is conferred by Sec. 344, Title 28, U. S. C., Sec. 237 of the Judicial Code Amended.

(b) State Statutes Which Are Involved

The excise tax law of Tennessee, requiring corporations to pay a privilege tax for doing business in Tennessee in corporate form, was first enacted in 1923, and as amended was included in the Code of Tennessee, adopted in 1932 as Ch. 12. Sec. 1316 of the Code, being the First Section of that Chapter as amended, read as follows:

> "1316. Tax imposed.—All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all such entities organized under the laws of any other state or county for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of finance and taxation annually an excise tax, in addition to all other taxes, equal to three and three-quarters (3.75%) per cent of the net earnings for their next preceding fiscal or calendar year, from business done within the state; provided, however, net earnings shall not include dividends received from any other corporation paying excise tax under the provisions of this statute, where such other corporation is a wholly owned subsidiary of the tax-payer."

In *Bank of Commerce* v. *Senter*, 149 Tenn., 579, the Supreme Court of Tennessee construed the above Act as follows:

> "The obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing

the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking."

The statute here in question, enacted by the General Assembly of Tennessee on January 31, 1951, amended the above quoted Section of the Code as follows:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That Section 1316 of the Official Code of Tennessee of 1932, the same being a part of what is known as the 'Corporation Excise Tax Law,' be and the same is hereby amended by adding, after the first paragraph thereof, the following:

"In computing the net earnings subject to excise taxation under this Act there shall be no deduction for any taxes on, or according to, or measured by income, profits, earnings, or excess profits imposed by authority of the Government of the United States of America, or by authority of any foreign government.

"Sec. 2. Be it further enacted, That this Act shall take effect from and after its passage, the public welfare requiring it; and that all taxes due on or after July 1, 1951, shall be computed in accordance herewith."

(c) The Date of the Judgment or Decree Sought to Be Reviewed, and the Date Upon Which Application for Appeal Is Presented

The final judgment or decree herein sought to be reviewed was entered and spread of record on July 11, A. D. 1952.

The petitition for appeal herein was presented and filed on Sept. 19th, A. D. 1952.

(d) Statement Showing that the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provisions Relied Upon

Complainant appellant has been and is engaged in doing business in corporate form during the year 1950 and until the present time. Its fiscal year coincides with the calendar year. Its fiscal year for 1950 ended December 31, 1950.

Defendant John F. Kizer, as Commissioner of Finance & Taxation of Tennessee, on July 1, 1951 levied an excise tax against complainant appellant for having done business in corporate form in Tennessee during the year 1950 of three and three-quarters percent of its net earnings, as authorized by Sec. 1316 of the Code of Tennessee above quoted, and, in addition, acting under the authority of the above quoted Statute, Sec. 6, Acts of 1951 of the General Assembly of Tennessee, levied a tax of three and three-fourths percent upon the amount which complainant appellant had paid to the United States as income and franchise taxes for the year 1950, amounting to additional taxation of $21,152.03.

Complainant appellant paid under protest the additional tax thus levied, and within the time allowed by the law of Tennessee brought suit in the Chancery Court of Davidson County, Tennessee, which had jurisdiction of the same, to recover the taxes thus paid, on the grounds, among others, that said exaction took from it $21,152.03 of its money and gave the same to the State of Tennessee, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

It further contended that the imposition of this tax by the State of Tennessee upon the taxes paid by it to the United States retarded and burdened the paramount power of the United States to levy and collect taxes as authorized

by Sec. 8, Article 1, of the Constitution of the United States and the laws of Congress enacted pursuant thereto.

The said State Chancery Court of Davidson County, Tennessee ruled against complainant appellant's said contentions, and the case was appealed to the Supreme Court of Tennessee, which is the highest Court of the State in which a decision can be had. In the Supreme Court of Tennessee, among other errors assigned, complainant appellant contended that said Chapter 6, Public Acts of 1951 of Tennessee, as construed and applied by the Commissioner of Finance & Taxation was so oppressive and arbitrary as to be a denial of due process guaranteed to every citizen by the Fourteenth Amendment to the Constitution of the United States, and void for that reason.

It was further assigned as error that the said Chapter 6, Acts of 1951 of Tennessee was void because it levied a tax upon the revenues of the United States paid by corporations doing business in corporate form in Tennessee, and thereby reduced by several million dollars each year the income and franchise taxes which the United States can collect from such corporations, and thus imposed a burden upon the power of the United States to levy and collect taxes, derogatory to the dignity, subversive of the powers, and repugnant to the paramount authority of the United States.

The case was heard by the Supreme Court of Tennessee upon arguments and briefs of counsel, and upon July 11, 1952 the said Court filed its opinion in which, among other things, it said:

> "We find no merit in the fifth assignment of error complaining that the tax as construed by the Commissioner is so oppressive and arbitrary as to be a denial of due process under the Fourteenth Amendment of the Constitution of the United States. * * *
>
> "Conceding that the Act is in a degree retroactive

> or retrospective, this does not in and of itself render it invalid, since, in our opinion, it does not impair the obligation of a contract or operate to divest rights to any vested interest."

Overruling the second contention made by complainant appellant, the Supreme Court of Tennessee, in its opinion, said:

> "The fourth assignment of error complains that the tax in question is subversive of the powers and repugnant to the paramount authority of the United States, and is void for that reason. The argument is made that it is a State tax upon a Federal tax, and thus imposes a burden upon the Federal Government. To this we cannnot give our assent for the reason the State tax is a tax upon net earnings with a disallowance of taxes. It is not a tax upon a tax. The deduction which is disallowed in computing the amount of tax that is due and collectible is expressly authorized by the statute and not pursuant to an administrative ruling. It does not interfere with the Federal power to tax."

On July 11, A. D. 1952, the Supreme Court of Tennessee entered its final judgment or decree pursuant to its above quoted opinion in favor of the validity of said Chapter 6, Acts of 1951, of the General Assembly of Tennessee, and denied relief to complainant appellant.

Counsel for complainants in a number of other similar cases which by agreement were awaiting the decision in this case as the test case desired the opinion of the Court clarified so that it could not be contended by the Internal Revenue Department that the tax was imposed for the current year instead of the preceding fiscal year.

While your petitioner and its counsel had no fear of such contention, yet in deference to the opinion of counsel in such other cases, it filed a petition asking for the clarification they desired.

Defendant Commissioner of Finance & Taxation filed answer to this petition for clarification in which the Franchise and Excise regulation under which the defendant Commissioner of Finance & Taxation collected the tax sued for, was quoted as follows:

> "6. The Franchise and Excise taxes are accrued taxes and pay for the privilege period ending with the closing of the books on which the report is based."

After explaining arguments made in defendant's brief at the hearing, the answer stated:

> "The Commissioner, as stated, presently construes the opinion as validating regulation 6 and if the Court feels that any response is necessary to the petitions and this reply, it is respectfully submitted that this could very well consist of a statement to the effect that the present practice of the Department of Finance and Taxation to collect the excise tax on the basis of regulation 6 as presently existing is a valid construction and interpretation of the excise tax statute."

After this answer was filed, your complainant considered further clarification of the Court's opinion unnecessary and withdrew its petition for clarification.

Pending suit, John F. Kizer resigned as Commissioner of Finance & Taxation, and J. M. Dickinson was appointed successor in office. The suit was then amended to make J. M. Dickinson defendant as such successor in office.

(e) Statement of the Grounds Upon Which it Is Contended That the Questions Involved Are Substantial

Summary

Two questions are presented to the Court on this appeal. First, whether said Chapter 6, Acts of 1951, of the General Assembly of Tennessee, as applied and enforced by the

Commissioner of Finance & Taxation of Tennessee, has taken from complainant appellant its property without due process of law, and, second: whether said statute imposes a burden upon the power of the United States to levy and collect taxes.

In addition to this suit, prosecuted by complainant appellant, one hundred and forty-two other corporations doing business in Tennessee filed in the Chancery Court of Davidson County, Tennessee similar suits to recover additional excise tax collected by the Commissioner of Finance & Taxation from each of them under said Chapter 6, Acts of 1951, all of which suits by agreement are stayed pending the final determination of this suit as a test case. The total amount sued for by all of said corporations exceeds two and one-half million dollars taken from these several corporations by the State of Tennessee through its Commissioner of Finance & Taxation under the provisions of the said Act here in question.

Since all such taxes paid to the State of Tennessee are, under the Federal law, deductible from income upon which both income and franchise taxes are imposed, the effect of this Act will be to withdraw said aggregated amount from the taxable income of approximately twelve hundred corporations doing business in Tennessee and thereby reduce the revenues of the United States by several million dollars.

In its defense filed by the State of Tennessee in the name of the Commissioner of Finance & Taxation in the Chancery Court of Davidson County, Tennessee, it was averred that the purpose of the Legislature of Tennessee in the enactment of Chapter 6, Acts of 1951, of the General Assembly of Tennessee was to avoid the effect of increased income and franchise taxes which it was then anticipated that the Congress of the United States would enact, and which if enacted would reduce the excise tax collectible by the State of Tennessee.

The Supreme Court of Tennessee, in its opinion filed on July 11, 1952, deciding this case, among other things said:

> "The underlying reason for the enactment of the amendatory Act herein assailed is that the Federal Congress had under consideration, or had actually passed a revenue bill increasing income taxes, and more especially excess profits taxes, upon corporations. In order to provide against loss of State revenue by allowing corporations to deduct the amount of Federal taxes from State excise taxes, it became necessary to pass the Act of 1951."

Complainant appellant contends that the averments in the defense filed, and this finding and expression of opinion by the Supreme Court of Tennessee is additional evidence of the purpose of the Legislature of Tennessee to directly impose a tax upon the income and franchise taxes collectible by the United States from this complainant appellant and other corporations doing business in Tennessee.

For these reasons, it is contended that the questions herein presented are substantial and not only affect all corporations doing business in Tennessee, but also directly affect the revenues of the United States.

Propositions and Authorities

I

Code, Sec. 1316, of the Excise Tax Law of Tennessee, quoted above, imposed a tax upon "net earnings" of corporations which are defined by the Supreme Court of Tennessee in *Bank of Commerce & Trust Co.* v. *Senter*, 149 Tenn., 596, as follows:

> "The term 'net earnings', not being defined in the Act, must be given its usual and ordinary meaning of what is left of earnings after deducting necessary and

legitimate items of expense incident to the corporate business."

Since Federal taxes were part of the necessary and legitimate expense incident to the corporate business, these had not been subjected to the excise tax previous to the enactment of the statute herein complained of.

The averments in defendants' defense filed in this case, and the finding and opinion of the Supreme Court of Tennessee as quoted above show that in the enactment of this statute it was the purpose of the Legislature of Tennessee to impose the tax directly upon the taxes paid to the United States notwithstanding the expressed opinion of the Supreme Court of Tennessee in this case to the contrary.

McCallum Co. v. *Massachusetts*, 279 U. S. 623, 73 Law Ed. 874.

Since this statute in question here imposes a tax directly upon the tax required by Federal law to be paid to the National Government, it retards and burdens the power of the United States to collect taxes, and is void.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 584, 39 L. Ed. 820;

Buchanan v. *Alexander*, 45 U. S. 29, 11 L. Ed. 857;

Van Brocklin v. *Anderson*, 117 U. S. 151, 29 L. Ed. 846;

Metcalf v. *Mitchell*, 269 U. S. 518, 70 L. Ed. 391.

While the power of the State and Federal Government to impose taxes upon the income of corporations is concurrent, the power of the United States as the supreme authority is paramount.

Union Pacific Ry. v. *Peniston*, 85 U. S. 5, 21 L. Ed. 787.

II

The tax here in question imposed by the Tennessee Excise Law upon corporations for doing business in the State in

corporate form is a privilege tax which the Supreme Court of Tennessee has ruled to be "based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking". *Bank of Commerce* v. *Senter*, 149 Tenn. 569.

The amending statute here in question, enacted on January 31st, and approved on February 1st, 1951, imposed a tax upon this appellant for the privilege which was exercised and ended on December 31st, 1950 before the Act was passed. Liability for this tax to the amount of $21,152.03 was not voluntarily assumed by this complainant appellant, and it cannot be said that "the element of absolute and unavoidable demand is lacking".

It is contended that the imposition of this tax by the statute in question, after the privilege had been exercised and ended, takes from complainant appellant its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Nichols v. *Coolidge*, 274 U. S. 531, 71 L. Ed. 1184;
Untermeyer v. *Anderson*, 276 U. S. 440, 72 L. Ed. 645;
Coolidge v. *Long*, 282 U. S. 582, 75 L. Ed. 562;
Welch v. *Henry*, 305 U. S. 144, 83 L. Ed. 87.

(f) Statement Respecting Opinion

The Supreme Court of Tennessee delivered a written opinion upon rendering the judgment or decree herein complained of, copy of which is attached as Appendix "A" to this jurisdictional statement.

Respectfully submitted,

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APPENDIX "A"

PENN-DIXIE CEMENT CORPORATION

v.

JOHN F. KIZER, Commissioner of Finance and Taxation, et al.

DAVIDSON EQUITY

Hon. William J. Wade, Chancellor

For the Appellant: Hon. Charles C. Moore, Hamilton Nat'l Bank Bldg., Chattanooga, Tennessee

For the Appellee: Hon. Roy H. Beeler, Attorney General, and Hon. Allison B. Humphreys, Solicitor General, Nashville, Tennessee

OPINION

The Penn-Dixie Cement Corporation filed its original bill in the Chancery Court at Nashville seeking to recover the sum of $21,152.03 which was paid to the Commissioner of Finance and Taxation under protest in August, 1951, as an additional excise tax for the privilege of doing business in corporate form in Tennessee during the year, 1950. The said tax was assessed and collected pursuant to the provisions of Chapter 6 of the Public Acts of 1951, the same being an amendment to Section 1316 of the Official Code of Tennessee of 1932 and generally known as the "Corporation Excise Tax Law." It was passed on January 31, 1951, and took effect "from and after its passage."

A brief summary of the provisions of the original Act and its administration by the Department of Finance and Taxation is deemed necessary to a clear understanding of the questions involved in the present litigation.

The original excise tax law was Chapter 21, Public Acts of 1923 and was enacted on February 16, 1923. The first tax payable under this statute became due July 1, 1923, or four and one-half months after its passage. The tax assessed was for the privilege of doing business in Tennessee, and was measured by the corporation's net earnings for the preceding year. The Act provides: "The tax herein im-

posed shall be due and payable on July 1, 1923, and on July 1st of each succeeding year."

The Act assailed in this case upon grounds of unconstitutionality reads as follows:

> "An Act to amend Section 1316 of the Official Code of Tennessee of 1932, the same being a part of what is known as the 'Corporation Excise Tax Law,' originally enacted as Chapter 21 of the Public Acts of 1923, and entitled: 'An Act to impose an excise tax upon all corporations and joint stock associations organized for profit under the laws of Tennessee, and those organized under the laws of other states and counties and doing business in Tennessee.'
>
> "Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Section 1316 of the Official Code of Tennessee of 1932, the same being a part of what is known as the 'Corporation Excise Tax Law,' be and the same is hereby amended by adding, after the first paragraph thereof, the following:
>
> "In computing the net earnings subject to excise taxation under this Act there shall be no deduction for any taxes on, or according to, or measured by income, profits, earnings, or excess profits imposed by authority of the Government of the United States of America, or by authority of any foreign government.
>
> "Sec. 2. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it; and that all taxes due on or after July 1, 1951, shall be computed in accordance herewith."

The original bill charges that the said exaction of $21,152.03 was unjust, illegal and contrary to the Constitution and laws of the State of Tennessee; that the construction placed upon the Act by the Commissioner was erroneous "in that he construed the said Act to retrospectively impose upon corporations additional excise tax for the year 1950"; that such construction would make the Act unconstitutional under Section 20, Article 1, of the Constitution of Tennessee, and in violation of Section 28,

Article 2, of the Constitution of Tennessee. The bill was amended so as to charge that the Act as construed by the Commissioner violates Section 20, Article 1, and Section 17, Article 2, of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States. The original bill and amendment thereto fail to charge any specific ground of unconstitutionality other than the Commissioner illegally construed it retroactively and imposed the tax for the year 1950, when it is claimed the tax was not due.

The State Commissioner of Finance and Taxation filed an answer denying that the tax was illegal and in violation of the Constitution.

> "Answering further, the defendant avers that the Legislature of 1951 enacted Chapter 6 of the Public Acts of 1951, which amended what is known as the 'Corporation Excise Tax Laws.' The effect of the amendment was to deny to corporations the deduction of federal income taxes in computing net earnings, subject to the Tennessee excise tax. The statute likewise provided that all taxes due on or after July 1, 1951, be computed in the manner required by the Act. Chapter 6 of the Public Acts of 1951 became effective on February 1, 1951."

The answer further denied "that Chapter 6 of the Public Acts of 1951 offends against any provision of the Constitution of Tennessee or the Constitution of the United States." The answer of the Commissioner reviews in some detail the interpretation of the original Act by the Courts, both the Chancery Court and this Court, and the opinions of the Attorney General of the State, as well as the administration of the law. The Chancellor heard the case on bill and answer, and certain stipulations, and dismissed the bill.

It is now before us for review under the following assignments of error:

> 1. "The Chancellor erred in holding that the additional excise tax imposed on this appellant for the year 1951, by Ch. 6 of the Public Acts of 1951, was due and

collectible at the time this appellant was forced to pay same, and denying relief on that ground because appellant's 1951 fiscal year did not expire until December 31st, 1951, and the excise tax law expressly provided that the tax imposed was not due and payable until July 1st of the year succeeding the year for which it was imposed."

2. "The Chancellor erred in holding that the excise tax sued for in this case was collected for the exercise of the privilege of doing business in corporate form in Tennessee for the current year of 1951, and not for the preceding year 1950, because

* * * * * * *

"(b) The excise tax law imposes the tax on net earnings for the preceding fiscal year and makes the tax imposed due and payable on July 1st of each succeeding year. This provision is not changed by the Amendment of 1951."

3. "The Chancellor erred in denying relief to appellant and dismissing its bill because

"(a) As construed and applied by the Commissioner of Finance and Taxation, this Ch. 6 of the Public Acts of 1951 took from appellant $21,152.03 of its property and bestowed same upon the State of Tennessee in violation of Sec. 20, Art. I of the Constitution of Tennessee, which prohibits retrospective legislative laws that disturb vested rights."

4. The Chancellor erred in denying appellant relief because Chapter 6, Public Acts of 1951, imposed a tax upon corporations in Tennessee which "reduces by several million dollars the income tax which the United States can collect from such corporations under the Constitution and laws of the United States," and is void for that reason.

5. The Chancellor erred in dismissing the bill because Chapter 6, Public Acts of 1951, as construed by the Commissioner is so "oppressive and arbitrary as to be a denial of due process" under the Fourteenth Amendment to the Constitution of the United States.

The first three assignments of error relate to the alleged illegal construction of the statute by the Commissioner in that he applied it retroactively in violation of Section 20, Article I of the Constitution "which prohibits retrospective legislative laws that disturb vested rights." The constitutional provision thus referred to provides: "That no retrospective law, or law impairing the obligations of contracts, shall be made." In Shields v. Land Company, 94 Tenn., 123, 147-148, it is said:

> "The constitutional provision upon which this contention is made is as follows: 'That no retrospective law, or law impairing the obligation of contracts, shall be made,' Const. Tenn., Art. I, Sec. 20.
>
> "This does not mean that absolutely no retrospective law shall be made, but only that no retrospective law which impairs the obligation of contracts or divests or impairs vested rights, shall be made."

The alleged retroactivity of the original Act of 1923 was considered in Bank of Commerce v. Senter, 149 Tenn., 569. The Act was passed in February, 1923, and the first tax assessed and collected was for 1923, the same being due and payable on July 1st of that year. A number of bills had been filed all making the contention of invalidity as being in violation of Section 20, Article I of the Constitution. The cases were consolidated and heard by both of the Chancellors of Davidson County, Hon. John R. Aust and Hon. James B. Newman, who were conceded to be two of the ablest jurists in Tennessee. In disposing of this contention the Chancellors held, as follows:

> "While the point was not pressed in oral argument, yet some of the bills raise the point that the Act is retrospective and is an ex post facto law.
>
> "First, we may say here there is no part of the Act which, in our opinion, has a retrospective effect. The law was passed and approved in February, 1923, and imposes the tax for that and all subsequent years. The tax for 1923 is due and payable July 1st, 1923, and on July 1st in all subsequent years. True, the Act makes

the measure of the tax due in any one year a per centum of the net earnings for the preceding year, but we can perceive nothing in that fact which makes the Act retroactive.

"Second, it has been repeatedly held in this State that the Constitution, Art. I, Sec. 20, forbidding retrospective laws, means only that no retrospective law which impairs the obligation of a contract or divests or impairs vested rights shall be passed. Shields v. Clifton Land Co., 94 Tenn. 148, citing State and Federal Cases.

"As the Act neither impairs the obligation of contracts, nor affects vested rights, it does not fall within the inhibition of either the State or National Constitutions."

Some of the defendants appealed from this decision. It does not appear from the assignments of error that able counsel for the appellants questioned the correctness of the Chancellors' opinion. This Court made no comment on this ground of the original bill but held that Chapter 21 of the Public Acts of 1923 was constitutional.

There appeared to be a degree of ambiguity in the original excise tax act with respect to the tax period for which the payment is made on July 1st of each succeeding year. This we think was fully clarified in Reynolds Tobacco Co. v. Carson, 187 Tenn., 157, to which we shall refer later on in this opinion.

The Chancellors in their joint opinion in the Senter case held that the payment was made for the calendar year in which the payment was made. In 1937, Mr. Edwin F. Hunt, an able lawyer and Assistant Attorney General of the State, ruled that the payment was made for the privilege of doing business during the ensuing year. In 1945, Mr. William F. Barry, Solicitor General of the State, and a lawyer of outstanding ability, ruled that the payment was for the privilege of doing business during the twelve months' period ending June 30th next preceding the payment date of July 1st. The Chancellor in the case at bar adopted the view expressed in the Hunt opinion.

It is argued by appellant's counsel, and other counsel who have filed briefs as *amici curiae*, that since the taxpayer's corporate year, or fiscal year, had closed at the time of the passage of Chapter 6, Acts of 1951, that the said Act must be construed as being retroactive in order to make it applicable to the appellant, and that if this is done the Act is unconstitutional.

The apparent uncertainty in administering this taxing statute arises from the fact that the "fiscal year" of corporations does not always coincide with the "tax year". The tax to be collected is of necessity measured by reference to the corporation's net earnings during the preceding fiscal year. It could not possibly be otherwise. Moreover the statute provides that the excise tax shall be due and payable on July 1st, which justifies the conclusion that it refers to taxes that are computable for the year next preceding that date.

While the question now before us was not expressly decided in Reynolds Tobacco Co. v. Carson, supra, we think it was definitely held that taxes "due and payable" on July 1st of each succeeding year refer to and are measured by "net profits" as shown in the return by the tax-paying corporation for the year preceding July 1st. Under Code Section 1248.146 every corporation liable for the tax is required to file a report, duly verified, giving a detailed statement of its earnings, net profits, etc. It is further provided: "The tax herein levied shall be paid to the commissioner of finance and taxation *on or before* July 1st of each year and *shall be paid at the time the sworn report is filed.*" (Emphasis supplied.) The taxpayer in the case at bar was thus required to file a sworn report of its taxable earnings which had accrued prior to July 1, 1951, and subject to the provisions of Chapter 6 of the Public Acts of 1951.

Adverting to the conflicting opinions issued from the office of the State Attorney General, the first by Hunt ruling that the Act was prospective in effect and the second by Barry that "a corporation pays on July 1 for a privilege already exercised and for the full and actual period of its previous existence", we adopt the latter view as the opinion of the Court. There is no contention that the taxpayer's annual

tax has been increased by the change of opinion. The increase in the amount of the tax is due entirely to the statutory method of computing the tax, which under the Amendatory Act of 1951, disallows the taxpayer the right to deduct its Federal Income tax from the State's Excise tax.

The underlying reason for the enactment of the amendatory Act herein assailed is that the Federal Congress had under consideration, or had actually passed, a revenue bill increasing income taxes, and more especially "excess profits" taxes upon corporations. In order to provide against loss of State revenue by allowing corporations to deduct the amount of Federal taxes from State Excise taxes it became necessary to pass the Act of 1951. Contention is made by appellant that the Act is not only void as being retroactive in effect but violates "due process" under the Federal Constitution. We cannot sustain either of these contentions as being sound.

Conceding that the Act is in a degree retroactive, or restrospective, this does not in and of itself render it invalid, since in our opinion it does not impair the obligation of a contract or operate to divest rights to any vested interest. Taxing statutes are generally held to be constitutional even though they have some retroactive effect. Millikin v. U. S., 283 U. S. 15, 21, and Welch v. Henry, 305 U. S. 134.

> "Mere retroactivity of a statute affecting taxation does not render it unconstitutional; such a statute is valid if it is not arbitrary, and does not disturb vested rights, impair contractual obligations, or violate due process." 16 C. J. S.—Constitutional Law, Sec. 419.
>
> "An income tax law is generally not unconstitutional because retrospective, and it may validly apply to the year in which enacted, or to prior, but recent, transactions; * * *.
>
> "Generally, an income tax law is not unconstitutional merely because of its retrospective operation, especially where such laws only affect deductions that may be taken from income, which are matters of legislative favor, and it has been said that some provisions in almost every income tax statute have been retroactive

for reasonable periods." 16 C. J. S.—Constitutional Law, Sec. 419 (b); 146 A. L. R.—Constitutionality of retroactive tax statute, page 1012; and "Income Taxes" —27 Am. Jur., Sec. 27.

The foregoing texts are supported by decisions from quite a number of foreign jurisdictions. In our own case of McCord v. Southern Ry. Co., 187 Tenn., 247, 248, it is said: "There is no vested right in an assessment for taxes." See also Mengel Box Co. v. Stevens, 141 Tenn., 373, 376, where it was held:

> "By the payment of the sum exacted of it in 1899, the complainant merely obtained license to do business in this State. The State was not cut off from imposing a higher license or from changing its method of privilege or excise taxation. This is what the State has done."

We find no merit in the appellant's contention that as construed by the Commissioner, the Act contains two subjects in violation of Section 17, Article 2 of the Constitution of Tennessee. The case of McCamey v. Cummings, 130 Tenn., 494, has no application here. The appellant insists in further support of the second assignment of error that the Chancellor was not at liberty to construe the Act and find that the payment made on July 1, 1951, was for the ensuing tax year. We find it unnecessary to respond to this contention. Regardless of whether the Act be construed as retrospective or prospective in its application we think it is constitutional based upon the authorities cited in this opinion. However, we think the record requires a decision upon the question presented, and it is our well considered opinion that the Chancellor was correct in holding that the tax was due. We are also of opinion that the question of the year for which the tax in question is paid is a matter of statutory construction and is a question of law.

The fourth assignment of error complains that the tax in question "is subversive of the powers and repugnant to the paramount authority of the United States" and is void for that reason. The argument is made that it is a

State tax upon a Federal tax and thus imposes a burden upon the Federal Government. To this we cannot give our assent for the reason the State tax is a tax upon net earnings with a disallowance of taxes. It is not a tax upon a tax. The deduction which is disallowed in computing the amount of tax that is due and collectible is expressly authorized by the statute and not pursuant to an administrative ruling. It does not interfere with the Federal power to tax.

There is a stipulation in the record to the effect that there are thirteen (13) states which impose a tax upon corporate income and do not allow any deduction of Federal taxes in computing the amount of the tax that is due. If the Federal Government fails to intervene and protest against this alleged unconstitutional invasion of its sovereignty the appellant is not privileged to make the point to protect its own financial interest.

We find no merit in the fifth assignment of error complaining that the tax as construed by the Commissioner is "so oppressive and arbitrary" as to be a denial of due process under the Fourteenth Amendment of the United States Constitution. The Federal decisions cited on the appellant's brief, Nichols v. Coolidge, 274 U. S. 531, 71 L. ed. 1184, and others do not control the question before us. On the contrary the case most applicable and controlling, as pointed out by opposing counsel, is United States v. Hudson, 299 U. S. 498, 500, wherein it is said:

> "As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution."

The assignments of error are overruled and the Chancellor's decree is affirmed.

NEIL, *C. J.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Plaintiff-Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Commissioner of Finance and Taxation,
Defendant-Appellee.

Appeal from the Supreme Court of the State of Tennessee,
Case No. 14,
Davidson Equity.

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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The appellee, for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I. Statement of Issues on Appeal.

The issue presented by this appeal is as simple as this: While the tax year still had five months to run, the legislature amended the statute to provide that taxes paid other governments should no longer be deducted in determining

net earnings, the base of the tax. This increased the tax paid by appellant. So, it brought suit, and lost.

Under the provisions of Sections 1316 et seq. of the Code of Tennessee, all corporations, both domestic and foreign, pay an excise tax, for the privilege of doing business in Tennessee in corporate form, of 3¾% of net earnings.[1] The tax is required to be paid on July 1st of each year, measured by the net earnings of the corporation during its fiscal or calendar year closing last preceding July 1st.[2] The privilege period paid for is the twelve months period immediately preceding July 1st.

The General Assembly of Tennessee, by an act which became effective on February 1, 1951, provided as follows:

> "In computing the net earnings subject to excise taxation under this Act there shall be no deduction for any taxes on, or according to, or measured by, income, profits, earnings, or excess profits imposed by authority of the Government of the United States of America, or by authority of any foreign government." (See Chapter 6, Public Acts of 1951.)

When, on August 14, 1951, appellant Penn-Dixie Cement Corporation, whose last fiscal closing was December 31,

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1 "All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of this state, other than those organized for general welfare and not for profit, and all such entities organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of finance and taxation annually an excise tax, in addition to all other taxes, equal to three and three-quarters per cent (3.75%) of the net earnings for their next preceding fiscal or calendar year, from business done within the state.

"In the case of corporations, cooperatives, joint-stock associations and business trusts doing business in Tennessee and elsewhere the net earnings shall be apportioned as hereinafter set forth and the net earnings thus apportioned to Tennessee shall be deemed to be the earnings arising from business done within the state and shall be the measure of this tax. Such method of apportionment shall be as follows: * * *."

(Section 1316, Supplement to the Code of Tennessee.)

2 "The tax imposed shall be due and payable on July 1 of each succeeding year. * * *"

Section 1318, Supplement to Code of Tennessee.)

1950, paid the excise tax due on July 1, 1951, it paid $21,-152.03 more tax than it would have paid had not the General Assembly amended the tax act as above indicated.

In due time, appellant brought suit in the Chancery Court of Davidson County, contending that the collection of an excise tax from it on the basis of the excise tax law as amended constituted a violation of the Constitution of Tennessee in that the act retroactively imposed additional excise taxes for the tax year 1950 which had expired, at the time of the enactment of the amendment and violated the Constitution of Tennessee in other regards not necessary to state here.

It was contended that the disallowance of the deduction of Federal taxes in determining net earnings, the base of the tax, was a tax on Federal taxes and violative of Article 1, Section 8, and Clause 1 of the Federal Constitution which provides that Congress shall have the power to lay and collect taxes.

It was contended, further, that the Constitution of the United States was violated in that due process of law and equal protection were denied because the excise tax as amended divested the appellant of vested rights in that it required the payment of an excise tax for a privilege period which had ended approximately a month prior to the time of the amendment to the tax act. In other words, it was contended that the privilege period to be paid for by the appellant on July 1st, ended when the appellant closed its books at the end of its fiscal year, which was December 31, 1950, and that the requirement that it pay on July 1, 1951, for a privilege which ended one month before the amendment was adopted, violated the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States.

The chancellor avoided the determination of these issues by holding that the tax was paid on July 1st for the privi-

lege of doing business during the next twelve months period, based on the earnings of the corporation during its preceding fiscal or calendar year. Under this construction of the statute no question of retroactivity was presented. The chancellor entered a decree dismissing the original bill, from which a broad appeal was prayed to the Supreme Court of Tennessee. On appeal, these same insistences were presented to the Supreme Court of Tennessee, and by a written opinion that court held:

First, that the tax act, as properly construed, required the payment of a tax on July 1st of each year, based on net earnings of the corporation during its preceding fiscal or calendar year, **and that the "tax period" paid for, or the "tax year" paid for, by the July 1st tax payment, was the twelve months period immediately preceding July 1st.** (This was the first time that this question had been passed on by the Court.) Prior to that time, in the Court's opinion in the case of R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157, the Court had indicated that the "tax period" or the "tax year" was not the fiscal or calendar year of the corporation, but the question had never been squarely passed on. However, in its opinion in this case, the Court did find and hold as indicated above.[3] Under this

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[3] "There appeared to be a degree of ambiguity in the original excise tax act with respect to the tax period for which the payment is made on July 1st of each succeeding year. This we think was fully clarified in Reynolds Tobacco Co. v. Carson, 187 Tenn. 157, to which we shall refer later on in this opinion. * * *

"The apparent uncertainty in administering this taxing statute arises from the fact that the 'fiscal year' of corporations does not always coincide with the 'tax year.' The tax to be collected is of necessity measured by reference to the corporation's net earnings during the preceding fiscal year. It could not possibly be otherwise. Moreover, the statute provides that the excise tax shall be due and payable on July 1st, which justifies the conclusion that it refers to taxes that are computable for the year next preceding that date.

"While the question now before us was not expressly decided in Reynolds Tobacco Co. v. Carson, supra, we think it was definitely held that taxes 'due and payable' on July 1st of each succeeding year refer to and are measured by 'net profits' as shown in the return by the tax-paying corporation for the year preceding July 1st. Under Code Section 1248.146 every corporation liable for the tax is required to file a report, duly verified, giving a detailed statement of its earnings, net profits, etc. It is further provided: 'The tax herein levied shall be paid to the com-

construction of the statute the excise tax year of 1950-1951 lacked five months of having expired at the time the legislature amended the excise tax law on February 1, 1951, and the tax as amended was only retroactive with respect to the seven months which had expired prior to the amendment.

Second, the Court held that the tax act as amended did not violate the Constitution of Tennessee in any regard and did not violate the due process of law provisions or the "equal protection" provisions of the Constitution of the United States. The cases of Millikin v. United States, 283 U. S. 15, and Welch v. Henry, 305 U. S. 134, were cited by the Supreme Court of Tennessee as authority for its ruling with respect to the Federal constitutional issues.

Third, the Supreme Court of Tennessee held that the disallowance of the deduction, though it would result in an increase in the excise taxes which might be deducted in determining Federal net income, did not constitute a tax upon a Federal tax and did not retard and burden the paramount power of the United States to lay and collect taxes:

Fourth, the Supreme Court of Tennessee sustained the decree of the chancellor dismissing the original bill.

When the opinion of the Supreme Court of Tennessee is studied, and it is understood that that Court holds that the tax period paid for on July 1st runs from July 1st to June 30th, and is not a period coextensive with the fiscal year, it is immediately understood and appreciated that the appellant is left with no complaint.

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missioner of finance and taxation **on or before** July 1st of each year and **shall be paid at the time the sworn report is filed.'** (Emphasis supplied.) The taxpayer in the case at bar was thus required to file a sworn report of its taxable earnings which had accrued prior to July 1, 1951, and subject to the provisions of Chapter 6 of the Public Acts of 1951."

(Penn-Dixie Cement Corporation v. J. M. Dickinson, Com'r, pp. 7, 8. Opinion of Supreme Court of Tennessee in petition for appeal.)

It is true that prior to the opinion of the Supreme Court of Tennessee in the present suit the Commissioner of Finance and Taxation had adopted excise and franchise tax Regulation 6 in the following language:

> "6. The Franchise and Excise taxes are accrued taxes and pay for the privilege period ending with the closing of the books on which the Report is based."

Under this regulation the privilege tax paid for by the July 1st tax payment was treated as being coextensive with the fiscal year of the corporation. If the statute sustained this regulation the tax period paid was coextensive with the fiscal year and had expired thirty-one days prior to the amendment.

In Tennessee, however, every tax regulation must be based on a proper construction of the taxing statute. If, under a proper construction of the statute, the tax period paid for on July 1st is not coextensive with the corporate fiscal year, then a regulation to that effect would be void.[4]

Since the Supreme Court of Tennessee has stated the tax period paid for extends from July 1st to June 30th, the Commissioner of Finance and Taxation has adopted a new Regulation 6 to conform to this construction of the statute as Exhibit A. A certified copy of this regulation is attached hereto. This regulation provides:

> "6. The Franchise and Excise taxes are accrued taxes and pay for a privilege period of twelve months next preceding June 30th."

It appears in the record that the office of the Attorney General of Tennessee was agreeable to construing the opinion of the Supreme Court of Tennessee in the present

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[4] "With regard to the Commissioner's regulations as to what was, and what was not, liquidation, it is elementary that the regulation must be within the scope of the Act, and the Act within the scope of the Constitution."

Fidelity-Bankers Trust Co. v. McCanless, 181 Tenn. 476, 481.

case as not requiring a revocation of the old Regulation 6, which had been adopted in the interest of corporations in the payment of their Federal income taxes, if the corporations affected did not disagree, and if the Supreme Court of Tennessee should see fit to entertain appellant's petition for a rehearing for this purpose.

However, before the amended petition to rehear and the reply could be passed on, the appellant dismissed its petition. The petition to rehear, the amendment thereto and the response of the Attorney General were ordered stricken from the record and, properly, should not be considered for any purpose, though they appear in the record because this was requested by appellant.[5]

This matter has been gone into at some length here in order that this Court might understand the actual issue to be determined by the Court if this appeal is to be further entertained and heard by the Court. The actual issue is not whether Tennessee can constitutionally amend its tax statute thirty-one days after the privilege period has ended but five months prior to the date of payment of the tax. The actual issue is whether Tennessee can amend its tax statute as it did while the tax year yet had five months to run.

It is anticipated that appellant will insist that this Court should pass on the constitutionality of the exaction of additional excise taxes from it on the basis that it paid a tax on July 1, 1951, for a privilege period coextensive with its fiscal year which ended December 31, 1950, in spite of the opinion of the Supreme Court, on the ground that the office of the Attorney General was agreeable to continuing the old Regulation 6 in effect.

This contention, if made, would be untenable since the agreement of the office of the Attorney General to the con-

[5] Opinion of the Supreme Court of Tennessee in this appeal, page 11.

tinuance of this old regulation even under the opinion of the Supreme Court was on the tacit understanding that this had to be agreeable to all taxpayers and concurred in by the Commissioner of Finance and Taxation. The fact of this appeal indicates that this attitude on the part of the office of the Attorney General of Tennessee has been rejected and the fact of the adoption of a new regulation by the Commissioner of Finance and Taxation of Tennessee shows that the Commissioner does not agree to this construction.

Accordingly, it is respectfully submitted that the constitutional rights of the appellant must be judged on the basis of the opinion of the Supreme Court of Tennessee, construing the statute, and the regulation of the Commissioner adopted pursuant to this construction, and not on the basis of the old Regulation 6.

Even if the opinion of the Supreme Court of Tennessee were to be construed as insisted by appellant, as validating the former Regulation 6, the issue to be decided would not be the issue as stated by the appellant but would be this: Can Tennessee amend its excise tax, so as to deny a taxpayer the benefit of a deduction, by an amendment adopted five months before the tax payment date, at which time the deduction would be claimed by the taxpayer and allowed or disallowed as the facts and law might require by the Commissioner of Finance and Taxation?

Appellant could not claim any deduction to determine net earnings, the base of the excise tax, prior to July 1st following its last fiscal closing period. Five months prior to the time when appellant could claim any deduction, the General Assembly of Tennessee enacted Chapter 6 which required the Commissioner of Finance and Taxation to deny this particular item as a deduction. This statute was enacted on February 1, 1951, within approximately one month of the close of the fiscal year of the appellant and

within one month of the close of the "privilege period" or "tax year" under the old Regulation 6.

The second issue complained of by the appellant as being a constitutional issue is that Chapter 6 is repugnant to the Constitution of the United States "because it imposes a tax upon taxes paid to the United States and thereby retards and burdens the paramount power of the United States to 'lay and collect taxes'." (Quoted from appellant's second assignment of error.)

The issue presented by this appeal with respect to this subject is not whether Tennessee can levy a tax on a tax. Chapter 6 does not undertake to do this. Chapter 6 simply provides that taxes paid other governments shall not be deductible in determining net earnings, the base of the Tennessee excise tax.

The reasoning by which appellant arrives at the conclusion that this is a tax upon a tax is this: By denying a Tennessee taxpayer the right to deduct Federal taxes, the amount of the excise tax paid Tennessee is increased. Taxes paid Tennessee by a taxpayer are deductible in determination of net income, the base of the Federal income tax. Since Federal taxes paid are no longer deductible, there will be a larger amount of excise taxes to be deducted in the determination of Federal net income. This will result in a decrease in the amount of Federal taxes.

Appellee does not believe that either of these two issues, which fairly summarize all of the contentions made by appellant, present any substantial Federal question, and, to the extent that it is claimed by appellant that any Federal question is involved, the long since decided cases of the Supreme Court of the United States construe the Constitution of the United States to the contrary.

II. No Substantial Federal Question Is Presented by This Appeal.

(a) The Issue of Retroactivity.

Although appellee has gone to some length in pointing out the difference between the issue with respect to retroactivity as he sees it and the issue with respect to retroactivity as the appellant sees it, actually, for the purposes of this appeal, it is immaterial which issue is considered as the issue to be determined. The opinion of the Supreme Court of the United States in the case of Welch v. Henry, 305 U. S. 134, makes it quite plain that the Tennessee Excise Tax as amended and as applied to appellant does not violate either "due process of law" or "equal protection," as these are guaranteed to appellant by the Constitution of the United States in either instance.

The question in the case of Welch v. Henry, supra, is stated in the opinion thus:

> "This appeal presents the question whether the Act of the Wisconsin Legislature of March 27, 1935, which imposed a tax on corporate dividends received by appellant in 1933 at rates different from those applicable in that year to other types of income and without deductions which were allowed in computing the tax on other income, infringes the equal protection and due process clauses of the Fourteenth Amendment" (p. 141).

The Court found that this action on the part of Wisconsin did not violate the Constitution of the United States in either of these regards, setting forth its holding with respect to this matter in the following language:

> "The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933,

But a tax is not necessarily unconstitutional because retroactive. Milliken v. United States, 283 U. S. 15, 21, 75 L. ed. 809, 814, 51 S. Ct. 324, and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

"In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. Nichols v. Coolidge, 274 U. S. 531, 542, 71 L. ed. 1184, 1192, 47 S. Ct. 710, 52 A. L. R. 1081; Untermyer v. Anderson, 276 U. S. 440, 445, 72 L. ed. 645, 647, 48 S. Ct. 353 (citing Blodgett v. Holden, 275 U. S. 142, 147, 72 L. ed. 206, 210, 48 S. Ct. 105); Coolidge v. Long, 282 U. S. 582, 75 L. ed. 562, 51 S. Ct. 306. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift, which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the

donor was forewarned by the statute books of the possibility of such a levy. Milliken v. United States, 283 U. S. 15, 75 L. ed. 809, 51 S. Ct. 324, supra. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

"Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. See Phillip Wagner v. Baltimore, 239 U. S. 207, 60 L. ed. 230, 36 S. Ct. 66; Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 S. Ct. 44; compare Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 454, 54 L. ed. 832, 836, 30 S. Ct. 532; Billings v. United States, 232 U. S. 261, 58 L. ed. 596, 605, 34 S. Ct. 421. Similarly, a tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one. The objection to the present tax is of a different character and is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate.

"Assuming that a tax may attempt to reach events so far in the past as to render the objection valid, we think that no such case is presented here. For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during

the year of the preceding session. See Untermyer v. Anderson, 276 U. S. 440, 72 L. ed. 645, 48 S. Ct. 353, supra, footnote 1. These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by pre-existing laws. This was notably the case with the 'Revenue Act of 1918,' enacted February 24, 1919, 40 Stat. at L. 1057, chap. 18, and made applicable to the calendar year 1918, which cut down exemptions and deductions, increased, in varying degrees, income, excess profits and capital stock taxes, altered the basis of surtaxes, and increased in progressive ratio the rates applicable to the higher brackets. Similarly the special munition manufacturer's tax, imposed on profits derived from sales of munitions. Act of September 8, 1916, Chap. 463, 39 Stat. at L. 756, 780, was applied to the twelve months ending December 31, 1916. Cf. Carbon Steel Co. v. Lewellyn, 251 U. S. 501, 64 L. ed. 375, 40 S. Ct. 283; United States v. Anderson, 269 U. S. 422, 435, 70 L. ed. 347, 348, 46 S. Ct. 131. The contention that the retroactive application of the Revenue Act is a denial of the due process guaranteed by the Fifth Amendment has been uniformly rejected. Stockdale v. Atlantic Ins. Co., 20 Wall. 323, 331, 22 L. ed. 348, 351; Lake Shore & M. S. R. Co. v. Rose, 95 U. S. 78, 80, 24 L. ed. 376, 377; Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 S. Ct. 421; Brushaber v. Union P. R. Co., 240 U. S. 1, 20, 60 L. ed. 493, 502, 36 S. Ct. 236, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713; Lynch v. Hornby, 247 U. S. 339, 343, 62 L. ed. 1149, 1151, 38 S. Ct. 543; La Belle Iron Works v. United States, 256 U. S. 377, 65 L. ed. 998, 41 S. Ct. 528. The like practice of the legislature of Wisconsin has been approved by the courts.

"The equitable distribution of the costs of government through the medium of an income tax is a delicate and difficult task. In its performance experience has been shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purpose to the need may be seriously obstructed if not defeated. We cannot say that the due process which the Constitution exacts denies that opportunity to legislatures; that it withholds from them, more than in the case of a prospective tax, authority to distribute the increased tax burden in the light of experience and in conformity with accepted notions of the requirements of equal protection; or that in view of well established legislative practice, both state and national, taxpayers can justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to the income at the first opportunity after knowledge of the nature and amount of the income is available. **And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, Cooper v. United States, 280 U. S. 409, 411, 74 L. ed. 516, 517, 50 S. Ct. 164, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.**"

Welch v. Henry, 305 U. S. 134, 146-150.

Under this opinion of the Supreme Court of the United States, which has been followed many, many times, both in Federal courts and state courts, and, which has never been limited or qualified, so far as appears from available

citators, the actions of Tennessee in this case did not violate any of the constitutional rights of appellant.

An effort is made by appellant to make it appear that some of the older opinions of the Supreme Court of the United States, such as Nichols v. Coolidge, 274 U. S. 531, and others along the same line, are applicable to this appeal. It is respectfully submitted that such is not the case. The Coolidge case and the other opinions cited by appellant on this issue refer to gift and inheritance taxes which are controlled by a different rule from taxes which are in the nature of income taxes, which, of course, the Tennessee Excise Tax is. The Tennessee Excise Tax was before this Court in Memphis Natural Gas Co. v. Roy H. Beeler, Attorney General of Tennessee, 315 U. S. 649, and it was likened to a nondiscriminatory tax upon net income.

It is submitted that there is no valid basis on which to distinguish the Welch v. Henry case from the present case. The fact that in the Welch case the tax was **upon** income, while in the present case the tax is **measured** by income does not, we submit, make the Welch v. Henry case any the less applicable.

This same argument was made by appellant before the Supreme Court of Tennessee, and it conceived that the excise tax was sufficiently in the nature of an income tax to cite the case of Welch v. Henry, supra, as authority for its action in dismissing the appeal to that court. This opinion of the Supreme Court of Tennessee as to the nature of the tax should be accepted by the United States Supreme Court.

(b) **The Issue of a Tax Upon a Tax.**

Appellant supports its contention that the power of the United States to levy and collect tax, as authorized by Section 8, Article 1, of the Constitution, is hampered and retarded, by the action of Tennessee, by referring to the

case of McCallum Co. v. Massachusetts, 279 U. S. 623. It is respectfully submitted that this case is in no wise in point. In that case Massachusetts undertook to tax the interest from Federal Farm Loan bonds which had been specifically exempted from state taxation by Act of Congress. The court found that though the tax was an excise tax and thus an indirect tax, that it was still a tax on tax exempt bonds. The state tax was thereupon stricken down. In that case the state tax was invalid because of an Act of Congress. There is no Act of Congress involved in this suit.

There is a stipulation in the record, which is referred to in the opinion of the Supreme Court of Tennessee[5] that there are thirteen states of the Union which impose a tax which is measured by or on corporate net income, which do not allow deduction of Federal taxes in computing state net income for tax purposes. It is difficult to conceive that this situation could have continued unchallenged until now, if it constituted an interference in the slightest degree with the Federal taxing power. It is more difficult to conceive that the many corporations affected by this condition would have submitted thereto if there was the slightest ground for contending that such is unconstitutional.

Taxes are deductible in determining Federal net income for Federal income tax purposes by reason of an Act of Congress. (U. S. C. A., Title 26, Sec. 23.) If it should be conceived by the Congress, which carries into effect the constitutional authority conferred on the United States Government by Section 8, Article 1, of the Constitution of the United States, that this action on the part of Tennessee resulted in the diminution of the taxes collected by the United States to the extent that notice should be taken thereof, Congress has the power under said Section 8,

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[5] Opinion of the Supreme Court of Tennessee in this appeal, page 11.

Article 1, to alter or repeal its act whereby credit is taken for taxes paid other governments in determining Federal net income.

The fallacy of appellant's contention plainly appears when it is considered that if this action on the part of Tennessee constitutes any interference with the Federal power to tax, then every tax which has been levied by every state and every political subdivision thereof is likewise unconstitutional, since all of these taxes result in the reduction of the amount of Federal income taxes collected by the United States.

It is respectfully submitted that the fact that Chapter 6 was enacted because anticipated Federal taxes would result in a decrease in the State excise tax, does not alter the case. The exercise of the sovereign authority of Tennessee to arrange its taxes so as to return an amount sufficient to operate the State Government cannot be questioned or declared invalid simply because realistic consideration is given to the fact that another sovereign government is levying taxes upon the same taxpayer, credit for which results in a decrease of the State tax.

The sole question to be considered should be whether the State tax involved undertakes to levy a tax contrary to a constitutional immunity from tax or contrary to a congressional exemption from tax.

III. Appellant's Failure to Comply With Paragraph 2, Rule 12.

Paragraph 2 of Rule 12 provides:

> "If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of

this rule, and (b) a statement directing attention to the provision of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorporated by him in the transcript of record prepared for this court upon the appeal."

As appears from the affidavit of counsel for the appellant and the acknowledgment of service made by the Attorney General of the State of Tennessee, one of the counsel for appellee, the appellant did not serve the appellee as provided in said paragraph 2 of Rule 12.

Appellant's explanation for this delay is that counsel had gone fishing. Such an explanation would be enough in some Tennessee courts for failure to abide by a rule thereof. It may be that this explanation is sufficient in this Honorable Court. We submit this matter to the Court's judgment.

Wherefore, the appellee respectfully moves that the appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Tennessee be affirmed.

ROY H. BEELER,
Attorney General of State of Tennessee,
ALLISON B. HUMPHREYS,
Solicitor General,
Counsel for Appellee.

EXHIBIT A.

State of Tennessee

(Great Seal)

Department of State

I, James H. Cummings, Secretary of State of the State of Tennessee, hereby certify that the annexed is a true and correct copy of the revocation of Excise Tax Rule and Regulation No. 6 and the new Rule and Regulation No. 6, which was promulgated and filed in this office on the 1st day of October, 1952.

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State, at Nashville, this 1st day of October in the year of our Lord nineteen hundred fifty-two.

James H. Cummings,
Secretary of State.

(Great Seal)

Pursuant to the Authority vested in me by Section 1323 of the Supplement to the Code of Tennessee and in order to conform the Excise Tax Rules and Regulations of the Department of Finance and Taxation of Tennessee to the opinion of the Supreme Court of Tennessee in the case of Penn-Dixie Cement Corporation v. John F. Kizer, Commissioner of Finance and Taxation of Tennessee, et al., Davidson Equity No. 14, I, J. M. Dickinson, Commissioner of Finance and Taxation of Tennessee, hereby revoke Regulation No. 6 of said Rules and Regulations and do hereby promulgate the following new Rule and Regulation No. 6:

"The Franchise and Excise Taxes are accrued taxes and pay for a privilege period of twelve months next preceding June 30th."

This regulation shall be and remain in full force and effect until withdrawn, modified or rescinded by a subsequent regulation. Promulgated in accordance with Chapter 111, Public Acts of 1941.

J. M. Dickinson,
J. M. Dickinson, Commissioner of Finance & Taxation.

Approved:

Roy H. Beeler,
Roy H. Beeler, Attorney General.

Filed with the Secretary of State, this 1st day of October, 1952.

James H. Cummings,
James H. Cummings, Secretary of State.

No. 408

FILED
OCT 22 1952
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer, Com'r. of Finance and Taxation,
Appellee.

BRIEF

For Appellant Opposing Motion to Dismiss Its Appeal.

CHAS. C. MOORE,
1324 Hamilton Bank Building,
Chattanooga, Tennessee,
Counsel for Penn-Dixie Cement Corporation.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Com'r. of Finance and Taxation,
Appellee.

BRIEF

For Appellant Opposing Motion to Dismiss Its Appeal.

Appellee bases his motion to dismiss on the grounds, first, that Ch. 6, Acts of 1951, in question, is not repugnant to the Fourteenth Amendment to the Constitution of the United States, and hence this Court has no jurisdiction, and, second, that Rule 12 of this Court was not complied with in that copy of petition for appeal, etc., was not served until nine days after allowance of appeal.

The first ground urged imposes on appellant's counsel the unpleasant duty of showing by his affidavit that ap-

pellee and his counsel are estopped to make that question here and impose on this Court the labor of studying the record to decide the question.

The affidavit of appellant's counsel is admissible to show the facts of such inconsistency on consideration of the motion to dismiss the appeal.

Red River Cattle Co. v. Needham, 137 U. S. 632, 34 L. Ed. 799;

Rector v. Lipscomb, 141 U. S. 557, 35 L. Ed. 857.

Appellee is estopped to take a position in this Court which is inconsistent and repugnant to the position taken in the Supreme Court of Tennessee by which he caused appellant's petition in that Court for clarification of its opinion to be withdrawn.

Davis v. Wakelee, 156 U. S. 681, 39 L. Ed. 579.

FACTS SHOWING ESTOPPEL.

After the Supreme Court of Tennessee filed its opinion in this case, counsel for a number of other corporations which, like appellant, had paid the additional tax under protest and sued to recover and whose suits were, by agreement, stayed in the trial Court awaiting the final decision of this as the test case, desired the opinion of the Court clarified so that it could not be contended by the U. S. Internal Revenue Department that the tax was imposed for current year instead of the preceding fiscal year. While appellant and its counsel had no fear of such contention, yet, in deference to the wishes of counsel in such other cases, it filed a petition asking for the clarification they desired.

Appellee by the same counsel, now moving to dismiss, filed in this cause in the State Supreme Court an answer to appellant's petition for clarification reading as follows:

"Reply to Original and Supplemental Petitions to Rehear.

"May It Please the Court:

"The petitions to rehear raise the question whether Franchise and Excise Tax Regulation 6 is valid. This regulation reads as follows:

> "'6. The Franchise and Excise taxes are accrued taxes and pay for the privilege period ending with the closing of the books on which the Report is based.'

"The regulation was adopted after the Barry opinion of 1945. Under it an excise tax is treated as due on the date the corporation closes its fiscal year. The tax is treated as due for the twelve months period then ending, or such part of the twelve months period as the corporation has been in business.

"This means that a corporation which closes its books on or before January 1st of a given year pays a tax on July 1st of that year measured by reference to the net earnings during the corporation's fiscal year ending prior to July 1st of the given year.

"This arrangement allows the corporation to deduct in its Federal income tax return filed on or before March 15th of a given year, the excise tax paid on or before January 1st of the given year.

"In the appellant Commissioner's reply brief, in the interest of reducing the period of time necessary to be retroactively considered, and thus to bring the case more certainly under the rule that tax statutes which relate back to recent transactions for a tax base are not unconstitutional, it was argued that the excise tax statutes were susceptible of the construction that the tax year for which the tax was paid on July 1st, was not the period coextensive with the corporation's fiscal

year, but was the period of July 1st of a given year to June 30th of the preceding year. In other words, it was argued that the tax year was not a corporation's fiscal year but was the same as the State of Tennessee's fiscal year, from July 1st to June 30th.

"As stated, this argument was advanced in order that the period which had to be retroactively considered might be reduced, and thus the case brought more firmly under the general rule.

"While there is some reference in the opinion to the State's argument with respect to this matter, as we read the opinion the court validated the Barry opinion of 1945, with the result that Franchise and Excise Tax Regulation 6 would stand approved by the court as a valid regulation.

"As we understand the petitions to rehear, they are directed at securing from the court an expression to this effect, since the appellant and all other corporations who are in the same situation with appellant will lose the excise tax deduction which they had heretofore taken as of March 15th, if it is now to be held that the tax accrued as of July 1st instead of on the date of the closing of the corporation's fiscal period.

"The Commissioner, as stated, presently construes the opinion as validating Regulation 6 and if the court feels that any response is necessary to the petitions and this reply it is respectfully submitted that this could very well consist of a statement to the effect that the present practice of the Department of Finance and Taxation to collect the excise tax on the basis of Regulation 6 as presently existing, is a valid construction and interpretation of the excise tax statute. Such a statement would have the effect of putting at rest concern on the part of many corporate taxpayers as to whether the Federal Government would allow

deductions heretofore taken on March 15th of 1951 and March 15th of 1952 for excise taxes calculated as of January 1st of 1951 and January 1st of 1952.

"Respectfully submitted,

(Signed) Allison B. Humphreys,
Allison B. Humphreys,
Solicitor General."

After the foregoing answer of appellee to petition for clarification was filed, counsel in the other cases were satisfied that no further clarification was needed, and suggested that petition for clarification be withdrawn.

Accordingly, appellant's counsel wrote Chief Justice Neil of the State Supreme Court, advising that counsel in other cases who had desired clarification were now satisfied, and suggested that petition for clarification be withdrawn to which appellant's counsel consented.

By return mail, appellant's counsel received copy of the order allowing withdrawal, and striking the petition, etc., from the record.

That copy of order will become the order of the Court if and when same is approved by a majority of the five members of the Supreme Court of Tennessee.

Being advised that appellee's counsel would take an inconsistent position here, appellant, in its praecipe for the transcript on this appeal filed in the State Court asked that the said petition for clarification, supplemental petition and above quoted answer thereto be copied into the transcript as items 5, 6 and 7, as appears from the record. When the Clerk of the State Court advised appellant's counsel that items 5, 6 and 7 could not be copied into the transcript nor certified copy given because same were not returned to his office, appellant's counsel prepared from

his files true copies thereof, and a stipulation that same may be included in the record on this appeal and mailed same to appellee's counsel, asking that same be signed and filed.

Appellant's counsel received the following reply to his request:

"This will acknowledge receipt of your letter of October 8, 1952, together with a stipulation which you request me to sign.

"I am returning to you herewith all enclosures in your letter of October 8th without my signature.

"Since you requested that the petition to rehear be withdrawn, and there has been a decree entered in the Supreme Court striking all of these papers from the record, I cannot stipulate that the same may be filed and treated as a part of the record in this cause. The same are not a part of the record, having been stricken from the record by decree of the court on your request.

"This office has done nothing to bring about this situation but we cannot assist you in extricating yourself therefrom. The record has been made as you first requested it and we think it should remain in the condition in which you have put it.

"We do not decline to sign the stipulation because we are particularly concerned at having the Supreme Court of the United States pass on the appeal with these items in the record, but because the same are no longer a part of the record as the result of your action.

"Yours very truly,

(Signed) Allison B. Humphreys,
Allison B. Humphreys,
Solicitor General."

Appellant having failed to have the petition for clarification and answer thereto supplied by agreement, now appends hereto the affidavit of its counsel that the statements made in the foregoing statement of facts showing estoppel are true.

On page 8 of appellee's statement it is claimed that appellee's answer to the petition to rehear in the State Court was made upon the tacit understanding that "this had to be agreeable to all taxpayers and concurred in by the Commissioner of Finance and Taxation.

This appellant and its counsel never heard of such understanding. Appellant did receive a letter from attorneys representing other corporations with similar suits pending which stated:

> "We have been informed by the Attorney General of Tennessee that if no further action is taken his office would not recommend a revision of the regulations of the Department of Finance & Taxation, but that in event of an appeal he would have to argue that the Supreme Court of Tennessee construed the Act as taxing a privilege for doing business during the twelve months immediately preceding July 1st rather than during the corporation's preceding fiscal year."

Chas. C. Moore, counsel for appellant, Penn-Dixie Cement Corporation, makes solemn oath that the facts stated in the foregoing statement of facts showing estoppel are true.

CHAS. C. MOORE,
Counsel for Appellant.

Sworn to and subscribed before me this 14th day of October, 1952.

Annie L. Smith,
Notary Public.

(Seal)

BRIEF AND CITATION OF AUTHORITIES FOR APPELLANT OPPOSING MOTION FOR DISMISSAL OF APPEAL.

Appellee's contention that the tax herein sued for was paid for a privilege to be exercised during the current year, and not for the privilege exercised and ended during the year preceding the passage of Ch. 6, Acts of 1951 of Tennessee in question is not sustained by the record, whether or not the estoppel above invoked be considered.

As shown in the record, the excise tax law of Tennessee requiring corporations to pay a tax upon their net earnings during the preceding fiscal year and making due on July 1st of the succeeding year was first enacted in 1923, and included in Ch. 12 of the Tennessee Code, beginning with Sec. 1316.

Upon the enactment of this law, the Attorney General's Office of Tennessee gave an opinion to the Commissioner of Finance and Taxation, charged with the duty of collecting the tax, that the tax was imposed upon the privilege exercised during the current year, which is referred to in the lower Court's opinion as the Hunt opinion.

In 1945, the Attorney General's Office gave to the Commissioner an opinion that

> "A corporation pays on July 1st for a privilege already exercised and for the full and actual period of its previous existence"

which is referred to in this record as the Barry opinion.

The Legislature of Tennessee then enacted Ch. 99, Acts of 1937, providing that the Commissioner of Finance and Taxation shall promulgate regulations for carrying this excise into effect, which when approved by the Attorney

General of Tennessee should have the force and effect of law.

Accordingly regulations were promulgated by the Commissioner, approved by the Attorney General of the State, including rule 6, which provides:

> "The franchise and excise taxes are accrued taxes and pay for the privilege period ending with the closing of the books on which the report is based."

The law required the report of the corporation to be based upon its net earnings for the preceding fiscal year. The report of this appellant made July 1st, 1951, was based upon its net earnings for the year 1950, since its preceding fiscal year ended with the preceding calendar year.

Later the R. J. Reynolds Tobacco Company maintained a warehouse in Tennessee during 1941 to 1945, but did not pay this excise tax.

On November 18th, 1946, the Commissioner of Finance and Taxation made a back assessment of excise tax against that Company for years 1941 to 1945, inclusive, and compelled the Company to pay, under protest, as here.

The Tobacco Company sued to recover the tax paid for year 1941 because barred by a statute of limitation which barred the collection of all taxes in six years from January 1st of the year for which assessed.

The trial Court held the 1941 taxes barred because assessed more than six years after January 1, 1941.

The Supreme Court of Tennessee, in the reported case of R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 158, reversed the trial Court, and held that the taxes for year 1951 were not barred by the statute because not due until July 1st, 1952, and hence six years from January 1, 1952,

had not elapsed when assessment was made in November, 1941.

In the instant case, the Supreme Court of Tennessee approved and followed its holding in Reynolds Tobacco Co. v. Carson, supra, making same more specific by this language:

> "Adverting to the conflicting opinions issued from the office of the State Attorney General, the first by Hunt, ruling that the Act was prospective in effect, and the second by Barry that 'a corporation pays on July 1 for a privilege already exercised and for the full and actual period of its previous existence', we adopt the latter view as the opinion of the Court."

The simple question for decision here is not that stated by appellee, but whether a State law imposing a tax of $21,152.03 for exercising a privilege before the law was passed violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The decision of this question requires that we consider the nature and incidence of this excise tax law.

In Bank of Commerce v. Senter, 149 Tenn. 579, the Supreme Court of Tennessee construed the excise tax law, saying:

> "The obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the Act, enjoying the privilege of engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking."

See also Mfg. Corporation v. Graham, 161 Tenn. 46.

The complainant corporation closes its fiscal year with the end of the calendar year. Hence the "privilege

period" on which it reported and paid on July 1st, 1951, was ended before this Ch. 6, Acts of 1951, was enacted.

It cannot be said that it voluntarily assumed liability for this additional tax, nor that "the element of absolute and unavoidable demand is lacking."

The legislature of Wisconsin passed a law in 1935 imposing tax upon corporate dividends received in 1933. In holding that Statute not violative of the Fourteenth Amendment to the Constitution of the United States, the Court distinguished in principle between a retrospective income tax and a retrospective privilege tax. The Court held that a retrospective tax could not under the Fourteenth Amendment be imposed upon the privilege of making a gift which the donor might have refrained from making had he known he was incurring tax liability, but that a retrospective income tax was not violative of that Amendment.

The Court said:

> "In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. Nichols v. Coolidge, 274 U. S. 531, 542, 71 L. ed. 1184, 1192, 47 S. Ct. 710, 52 A. L. R. 1081; Untermyer v. Anderson, 276 U. S. 440, 445, 72 L. ed. 645, 647, 48 S. Ct. 353 (citing Blodgett v. Holden, 275 U. S. 142, 147, 72 L. ed. 206, 210, 48 S. Ct. 105); Coolidge v. Long, 282 U. S. 582, 75 L. ed. 562, 51 S. Ct. 306. Since, in each of these cases, the donor might freely have chosen to give, or not to give, the taxation, after the choice was made, of a gift which he might well have

refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer."

Welch v. Henry, 305 U. S. 144, 83 L. ed. 87.

The principle stated in the above quotation is applicable here. Appellant could have retired from Tennessee and avoided liability for the tax sued for if it had known that the tax would be imposed.

In addition to the case of Welch v. Henry, supra, the Tennessee Supreme Court cited the case of United States v. Hudson, 299 U. S. 500, 81 L. Ed. 370, as applicable and controlling in support of its holding that the Fourteenth Amendment was not violated by the Act in question here.

That case held that a tax upon profits realized from the sale of silver bullion shortly before Congress imposed the tax was an income tax and hence within the principle ruled in a number of cases that an income tax could be made retroactive for a reasonable time without violating due process under the Fifth Amendment.

As pointed out in Welch v. Henry, supra, that case is not applicable here because the tax here in question was a privilege tax to be incurred by the voluntary act of the taxpayer with the element of absolute and unavoidable demand lacking, as ruled by the Supreme Court of Tennessee in Bank of Commerce & Trust Co. v. Senter, supra.

The opinion of the Tennessee Supreme Court also cites the case of Milliken v. United States, 283 U. S. 20, 75 L. Ed. 809, in support of its holding. In that case an Act of Congress imposing a tax upon gifts made in contemplation of death, before the Act was passed, was sustained upon the ground that, "Such gifts are motivated by the

same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before but in contemplation of death."

This Court's opinion in that case distinguishes and approves the holding of the cases of Nichols v. Coolidge, and others relied on by appellant.

The Tennessee Supreme Court's opinion admits that this Act in question here is retroactive, but says this does not render it invalid "since in our opinion it does not impair the obligation of a contract or operate to divest rights to any vested interest."

That holding is challenged as error by appellant's fourth assignment. Title to the $21,152.03 which the Statute in question took from appellant and gave to the State of Tennessee was "vested" in appellant at the time of the taking. It was appellant's property.

The fourteenth Amendment here involved provides that "No state shall * * * deprive any person of life, liberty or property without due process of law."

Clearly, the statute here in question deprived appellant of $21,152.03 of its "property," and, to be valid, the deprivation must have been by "due process of law."

Due process, as applied to State legislation under the fourteenth Amendment, means the same as due process as applied to Federal legislation under the fifth Amendment. Hence, the following cases holding Acts of Congress void under the fifth Amendment because depriving persons of property without due process of law are in point here.

In Nichols v. Coolidge, 274 U. S. 531-42, 71 L. Ed. 1184-1192, 47 S. Ct. 710, 52 A. L. R. 1081, an Act of Congress imposing a tax upon gifts that had been made before the Act was passed was held to be "so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment."

In that case, the gift had been made twelve years before the Act of Congress imposing the tax was passed.

In Blodgett v. Holden, 275 U. S. 142, 72 L. Ed. 206, 48 Sup. Ct. Rep. 105, the gift was made in January, 1924, and the Act of Congress taxing that gift was introduced afterwards and passed June 2, 1924.

In Untermeyer v. Anderson, 276 U. S. 444, 72 L. Ed. 646, the gift was made on May 23, 1924, while the bill to tax the gift was pending in Congress, which was passed and approved on June 2, 1924, only nine days after the gift was made.

In each of the above cases, this Court held that the Act of Congress imposing a tax on the gifts made before its passage was in violation of the due process clause of the 5th Amendment, and was void for that reason.

On the authority of the above case, and with all due respect, appellant earnestly insists that the Tennessee Supreme Court erred in holding appellant was not deprived of its property without due process of law by the enforcement of Ch. 6, Acts of 1951 of Tennessee against it, and in denying appellant's right to recover same.

II.

The second and fifth errors assigned herein, challenged on pages 15-17 in statement of appellee, charged that Ch. 6, Acts of 1951 is invalid because it is subversive of

the powers and repugnant to the paramount authority of the United States to "lay and collect taxes" as authorized by the Federal Constitution.

In holding otherwise, the State Court said:

> "To this we cannot give our assent for the reason the State tax is a tax upon net earnings with a disallowance of taxes. It is not a tax upon a tax."

Appellant respectfully insists that the tax imposed by the Statute in question is not a tax upon "net earnings" but is imposed directly upon the taxes paid to the United States, while all other taxes and expenses are allowed to be deducted.

It is well settled that this Court is not bound by the construction of the State Statute made by the State Court when its validity is challenged, but will determine for itself the nature and effect of the Statute.

McCallen Co. v. Massachusetts, 279 U. S. 625, 73 L. Ed. 879;

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 298, 59 L. Ed. 237.

Previous to the enactment of the amending Act in question, the Tennessee excise tax law did impose this excise tax on "net earnings" which had been defined to be what is left after deducting necessary and legitimate items of expenses, including taxes.

Bank of Commerce & Trust Co. v. Senter, 149 Tenn. 596;

So. Coal Co. v. McCanless, 183 Tenn. 462.

This Ch. 6 of the Acts of 1951 singles out Federal taxes paid during the preceding year from all other expenses and levies the excise directly upon such taxes, and not

merely indirectly, incidental and fortuitous, which distinguished and sustained the excise tax considered in Flint v. Stone, Tracy & Co., 220 U. S. 107, 55 L. Ed. 389, and other cases.

A statute of the State of Massachusetts parallel in its provisions and effect to Ch. 6, Acts of 1951, was considered and held void on the ground herein assigned by the Supreme Court of the United States in the case of Macallen Co. v. Massachusetts, 279 U. S. 623, 73 L. Ed. 874.

The excise tax law of Massachusetts permitting corporations to do business in that State in corporate form had imposed an excise of two and one-half per cent upon net income derived from business in the State, exempting income from tax free bonds. An Amendment to the law provided in effect that the interest from tax free bonds should not be deducted from the income on which the excise tax was calculated.

The Macallen Company owned Federal Farm Loan bonds exempt from State taxation.

In reversing the decision of the Supreme Court of that State sustaining the Act, the U. S. Supreme Court said:

> "As has been many times decided, neither State Courts nor legislatures by giving the tax a particular name or by using some form of words can take away our duty to consider its nature and effect."

The Court's opinion then cites a number of cases supporting its holding that the Act in question levies a tax directly on the interest from tax free bonds.

The Court's opinion then says:

> "The Court below predicates its opinion upon a series of decisions of which Flint v. Stone-Tracy &

Co., 220 U. S. 107, is the extreme example, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation, although a part of such income is derived from non-taxable property. * * *

"The distinction pointed out in these cases is between an attempt to tax the property or income as such and to measure a legitimate tax upon the privileges involved in the use thereof. It is implicit in all that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the on-taxable subject by its use as a measure of value was not fortuitous and incidental."

The Court's opinion then refers to a report of a tax Commission appointed by the Legislature of Massachusetts which perpared and recommended that Amendment to the excise tax law of Massachusetts as a means of avoiding large exemptions of tax free bonds then allowed by the excise tax law as indicative that the Amendment was a direct tax on the interest from tax free bonds of the United States.

In the instant case, appellee's answer and the opinion of State Supreme Court state that this Ch. 6 of Acts of 1951 was enacted by the Legislature in order to tax the large amount of Federal income tax that corporations doing business in Tennessee were paying, and the larger amount which it was expected they would have to pay to the United States as it was expected that the Congress would greatly increase the income tax corporations would have to pay to the United States.

These statements disclose more clearly than the Commission's report in the Macallen case that the additional excise tax provided by this Amendment was imposed di-

rectly upon the income tax payable to the United States by corporations doing business in Tennessee.

The Constitution and laws of the United States exempts this State tax from income taxation by the United States.

Eisner v. McComber, 252 U. S. 204, 64 L. Ed. 529.

Under the provisions of this 1951 Amendment here considered, the United States would lose annually two and one-half million dollars of its income tax, and to that extent its power of taxation would be subverted and defeated.

It has been many times decided, as stated in Pollock v. Farmer's Loan & Trust Co., 157 U. S. 584, 39 L. Ed. 820:

> "The Constitution contemplates the independent exercise by the Nation and the State severally of their constitutional powers.
>
> "As the States cannot tax the powers, the operations or the property of the United States nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

In California v. Central Pacific Ry., 127 U. S. 45, 32 L. Ed. 158, the Court held void a State tax upon the franchise of an interstate railroad granted by Congress. The Court said:

> "The power conferred emanates from and is a portion of the power of the Government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the Government and repugnant to its paramount sovereignty."

This language was quoted and applied to the tax held void in the Macallen case, supra.

In Buchanan v. Alexander, 45 U. S. 29, 11 L. Ed. 857, the Court said:

> "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the Government may be suspended."

In Van Brocklin v. Anderson, 117 U. S. 151, 29 L. Ed. 846, the Court said:

> "The States have no power by taxation or otherwise to retard, impede, burden or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general Government."

In U. S. v. Baltimore & O. R. R. Co., 84 U. S. 322, 21 L. Ed. 597, it was held that the United States could not tax dividends received by a municipal corporation of a State. The Court said:

> "The reason for exempting all property and income of the State or of a municipal corporation which is a political division of the State from Federal taxation equally requires the exemption of all the property and income of the National Government from State taxation."

These additional cases, in principle, support the second Assignment of Error:

McCullock v. Maryland, 17 U. S. 316, 4 L. Ed. 579;
Northwestern Life Ins. Co. v. Wisconsin, 275 U. S. 136, 72 L. Ed. 202;
Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 69 L. Ed. 916;
Natl. Life Ins. Co v. U. S., 277 U. S. 508, 72 L. Ed. 968;
Metcalf v. Mitchell, 269 U. S. 518, 70 L. Ed. 391;
South Carolina v. United States, 199 U. S. 437, 50 L. Ed. 269;

Union Pacific Ry. v. Penniston, 85 U. S. 30, 21 L. Ed. 791;

Lane v. Organ, 74 U. S. 80, 19 L. Ed. 105.

Alleged Violation of Rule 12 of This Court.

Appellee's motion filed in the State Court seeks dismissal of the appeal on the ground that copy of appeal papers were not served within five days from allowance of appeal.

Reply to the motion, with affidavit of appellant's attorney attached, was filed, which shows that because the Chief Justice of the State Supreme Court was away on vacation, the appeal papers were on September 16th, 1952, mailed to the Clerk of this Court, with request that he present same to a Justice of this Court for consideration and allowance of appeal.

Appellant's attorney then prepared copies as required by Rule 12 for service on appellee, and went on a short fishing trip, in the belief that at least a week would elapse before the appeal was allowed.

Returning to his office on September 26th, 1952, he was surprised to find a letter from the Clerk of this Court, advising that the appeal had been allowed on September 19th, 1952. He at once mailed all papers and statements required, together with copy of praecipe for the record, to Solicitor General of Tennessee, who represented appellee, with request that he acknowledge service and file acknowledgment with the Clerk of the State Court.

On September 30th, 1952, appellant's attorney received copy of acknowledgment of service, stating appeal papers were received on September 29th, 1952, and giving notice that motion to dismiss would be filed because more than five days had elapsed from allowance of appeal.

Appellant insists that the four days of delay complained of was not intentional nor due to neglect; that no inconvenience was caused and the prosecution of the appeal in this Court was not delayed thereby. Hence, this delay is excusable and motion to dismiss should be overruled.

The requirements of Rule 12 are not jurisdictional, and par. 6 of the rule this Court reserves full discretion "to take such action as it deems proper" in the event any requirement is not complied with.

In Richardson v. Green, 130 U. S. 104, four appeals were taken. In three cases the transcript was not filed during the succeeding term and these were dismissed for want of jurisdiction. In the fourth case, the record was filed in time to give jurisdiction but the rules 9 and 10 of this Court were not complied with for more than a year.

A motion to dismiss was made on that ground, which the Court overruled.

The head note is:

> "Where the record was duly received and filed by the Clerk of this Court, but the appeals had not been docketed because the rules as to a deposit for cost and as to entry of appearance had not, through inadvertence, been complied with, and afterwards on a compliance with such rules the case was docketed and appearance entered, a subsequent motion to dismiss for not docketing the case in time will not be granted."

See also—

Edwards v. United States, 102 U. S. 575;
Green v. Elbert, 137 U. S. 615.

On foregoing authorities appellant insists there is no merit in appellee's motion to dismiss the appeal, and same should be overruled.

Adversary statement cites the case of Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, which considered only the effect of the tax involved in that case under the Commerce clause of the Federal Constitution. The 14th Amendment was in no way considered.

It is a sufficient answer to the argument made on page 16 of the statement that Congress could avoid the effect of Ch. 6, Acts of 1951, in question by denying the right to deduct State taxes from income—that the Sixteenth Amendment, authorizing Congress to tax incomes has been construed to mean net income or profits, and does not authorize denial of any legitimate expenses.

Eisner v. McComber, 252 U. S. 207, 64 L. Ed. 529;
Helvering v. F. & R. Lazarus & Co., 308 U. S. 254, 84 L. Ed. 229.

CONCLUSION.

With apology for the length of this brief, appellant insists that the appeal in this case is meritorious, and the relief sought should be granted.

Respectfully submitted,

CHAS. C. MOORE,
1324 Hamilton Bank Building,
Chattanooga, Tennessee,
Counsel for Penn-Dixie Cement Corporation.

No. 108

Office - Supreme Court, U.S.
FILED
OCT 25 1952
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer, Com'r. of Finance and Taxation,
Appellee.

AMENDMENT AND CORRECTION OF PRINTED BRIEF FOR APPELLANT OPPOSING MOTION TO DISMISS ITS APPEAL.

This is filed to amend and correct errors made on page 9 of the printed brief for appellant opposing the motion to dismiss its appeal.

In reviewing the case of R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 158, to show that the Supreme Court of Tennessee had in 1948 construed the Tennessee Excise tax law under consideration here as making the tax payable July 1st of each year, payment for the privilege exercised during the corporation's preceding fiscal year and not the current year, the last three paragraphs on page 9 should read as follows:

"The Tobacco Company sued to recover the tax paid for year 1941 on the ground that its assessment and collection was barred by a statute of limitation which barred collection of all taxes after six years from the first of January of the year for which such taxes accrued.

"The trial Court held the taxes for 1941 barred because assessed and collected more than six years after January 1st, 1940.

"The Supreme Court on appeal reversed and sustained the assessment, holding that the statute of limitations did not begin to run until the tax was due."

The Court said:

"Since the statutory tax year and the corporation's fiscal year are the same, the return by the corporation for the year preceding July 1st, 1941, could have been filed only after July 1st, 1941. The information necessary to complete the return was available only after that date; therefore, to require the State to collect the tax before statistics necessary for assessment were available and before the sales upon which the tax was based had been made would be to require the impossible.

"Further, the two Acts fix the due date for the payment of the tax on July 1st after the fiscal or business year on which the tax is levied."

Respectfully submitted,

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Chattanooga, Tennessee,
Attorney for Penn-Dixie Cement
Corporation.

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FILED
NOV 3 1952
HAROLD B. WILLEY, Clerk

No. 408

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Plaintiff-Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Commissioner of Finance and Taxation,
Defendant-Appellee.

Appeal from the Supreme Court of the State of Tennessee,
Case No. 14.
Davidson Equity.

MOTION

To Strike Plea of Estoppel.

ROY H. BEELER,
Attorney General of the State
of Tennessee,
ALLISON B. HUMPHREYS,
Solicitor General,
Counsel for Appellee.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

TABLE OF CASES CITED.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Plaintiff-Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Commissioner of Finance and Taxation,
Defendant-Appellee.

Appeal from the Supreme Court of the State of Tennessee,
Case No. 14.
Davidson Equity.

MOTION

To Strike Plea of Estoppel.

An appeal has heretofore been granted appellant on a petition which presents the following issue:

The appellant's 1950 excise tax year ended on December 31, 1950. The tax payable on "net earnings" for that tax year was not due until July 1, 1951. By Act effective on February 1, 1951, thirty-one days after the end of the tax year, but five months before tax payment date, July 1, 1951, and at the first session of the Tennessee Legislature

convening after the end of the tax year, it was provided that taxes paid the United States and foreign governments could not be deducted in determining "net earnings," the base of the Tennessee excise tax. This resulted in an increase of appellant's tax. The issue as presented by the petition was: Could an act retrospective to this extent be enacted without violating due process of law and equal protection under the Fourteenth Amendment?

The appellant filed a motion to dismiss or affirm in which it was contended that upon a proper construction of the opinion of the Supreme Court of Tennessee, the issue was not as stated in the petition but was this: At the time of the amendment of the Excise Tax Act in February, 1951, the tax year still had five months to run, so that the amendment was only retroactive as to the seven months of the twelve months period which had expired at the time of the enactment of the amendment, Chapter 6, on February 1, 1951.

The only controversy between appellant and appellee with respect to the issue is whether the opinion of the Supreme Court of Tennessee fixes the tax year as ending December 31, 1950 or July 1st, 1951. If the opinion fixes the tax year as ending July 1, 1951, then the issue is as stated by appellee. If the opinion fixes the tax year as ending December 31, 1950, then the issue is as stated by appellant.

The opinion of this court in Welch v. Henry, 305 U. S. 134, requires that the appeal be dismissed regardless of who is right with respect to the issue presented by the appeal.

If the appellant is right about the issue presented by the appeal, the opinion in the case of **Welch v. Henry**, supra, plainly requires that the appeal be dismissed since it is

plain that under appellant's statement of the issue the excise tax was amended at the first legislative opportunity to do so following the tax year.[1] In other words, the amendment was made on February 1, 1951, thirty-one days after the close of the tax year of 1950. This plainly brings the amendment within the rule laid down in the **Welch v. Henry** case to the effect:

> "And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, Cooper v. United States, 280 U. S. 409, 74 L. ed. 516, 50 S. Ct. 164, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment."
>
> **Welch v. Henry**, 305 U. S. 134, 146-150.

However, the plea of estoppel tendered by appellant is not well taken and should be stricken for the following reasons:

In substance, the plea is: That a petition for clarification of the opinion of the Supreme Court of Tennessee, in the form of a petition to rehear, was filed in the Supreme Court of Tennessee. That a reply was filed thereto by appellee in which the appellee construed the opinion of the Supreme Court of Tennessee to the same effect as the petition to rehear. That without awaiting the further opinion of the Supreme Court on the matter the petition was voluntarily dismissed by the petitioner-appellant, without the entry of any decree or order other than an order that the

1 "Sec. 8. When legislature to meet; when governor to be inaugurated. —The first session of the general assembly shall commence on the first Monday in October, one thousand eight hundred and seventy-one, at which time the term of service of the members shall commence, and expire on the first Tuesday of November, one thousand eight hundred and seventy-two; at which session the governor elected on the second Tuesday in November, one thousand eight hundred and seventy, shall be inaugurated; and, forever thereafter, the general assembly shall meet on the first Monday in January, next ensuing the election, at which session thereof the governor shall be inaugurated."

Article 2, Sec. 8, Constitution of Tennessee.

petition and reply be dismissed on the motion of appellant and **stricken from the record.** This was done and the same do not constitute a part of the record, and are not before this Court as a part thereof. The reply which was filed is, however, set forth in the affidavit. The petition to rehear, which should be before the Court if the reply is to be considered for any purpose, is not before the Court.

If the plea is to be treated as a plea of estoppel of record, it is not good since there is no record to support it. In the absence of the petition, the plea may not be sustained as a plea of an estoppel of record and should not be considered for this purpose.

The plea, if treated as a plea of estoppel *in pais*, or an equitable estoppel, would not be good because of the following reasons:

First, the dismissal of the petition to rehear was purely voluntary and not at the suggestion of the appellee.

Second, the reply filed suggested that "the Commissioner as stated **presently** construes the opinion as validating Regulation 6, etc." [2] This makes it clear that this was not the fixed view of the Commissioner but the view was subject to alteration as circumstances might require.

Third, the conclusions in the reply were conclusions directed to the Supreme Court of Tennessee, not the petitioner, as to how a legal opinion should be construed, and were not conclusions of fact or representations of fact conducive to the action taken by appellant in dismissing its petition.

Fourth, upon a reading of the opinion of the Supreme Court of Tennessee it is so plain that that court considered the tax year to be a period of twelve months immediately preceding July 1st, that it is more reasonable to believe

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2 Reply to petition to rehear. Emphasis supplied.

that the petitioner dismissed its petition for fear that it would secure a pronouncement from the court which would prevent the arrangement then being agreed to by the Commissioner than for any other reason. In other words, the motivating reason for the dismissal of the petition was fear of the consequences thereof rather than otherwise.

Fifth, there was no decree entered to the effect now contended for by appellant, but the Supreme Court of Tennessee was content simply to dismiss the petition to rehear and the reply thereto, and to order the same stricken from the record.

Sixth, the State of Tennessee, as a sovereign state, cannot be estopped with respect to its tax collections by the opinion of one of its officials contrary to the requirement of the statute law of the state. In other words, the question always is, in case of the expression of an opinion by a state official as to the meaning of a statute or an opinion of the Supreme Court of the state: Is the opinion correct upon a consideration of the statute or the opinion of the court? The state is not estopped thereby.[3]

Accordingly, appellee submits that the plea of estoppel is not well taken and the same should be stricken. Or, in any event, the appeal should be dismissed or affirmed as in the opinion of this Court the record may require.

The controversy between the appellant and appellee as to the proper construction of the opinion of the Supreme Court of Tennessee does not involve a Federal question and can be resolved by these parties in litigation in the State courts. The situation of the appellant could not be improved by securing a further clarification of the opinion of the Supreme Court of Tennessee at this time, because even

[3] United States v. City and County of San Francisco, 310 U. S. 16, 84 L. ed. 1050;
R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157;
Gilman Paint & Varnish Co. v. Carson, 190 Tenn. 256

if the Supreme Court of Tennessee were to clarify its opinion so as to satisfy the appellant that the issue is as appellant states it, it would still be necessary to dismiss the appeal, if the opinion of this Honorable Court in **Welch v. Henry**, supra, is still to be followed, which we ever pray will be the case.

Respectfully submitted,

ROY H. BEELER,
Attorney General of State of Tennessee,

ALLISON B. HUMPHREYS,
Solicitor General,

Counsel for Appellee.

No. 108

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Com'r. of Finance and Taxation,
Appellee.

BRIEF

For Appellant Opposing Motion to Strike Plea of Estoppel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Com'r. of Finance and Taxation,
Appellee.

BRIEF

For Appellant Opposing Motion to Strike Plea of Estoppel.

The motion of appellee to strike brief for appellant invoking estoppel is based on the principle that a public officer may not be estopped from performing an official duty imposed upon him by law.

Appellant in reply says there is no law imposing upon appellee the official duty of taking one position in the court below by which he obtains withdrawal of appellant's petition for clarification of the opinion of that Court, and then, on appeal, take the opposite position in this Court.

After averring in his answer to appellant's petition for clarification that the Supreme Court of Tennessee in deciding this case had overruled the argument made in his behalf in that court that the tax sued for herein was paid for the current tax year expiring July 1st, 1951, and had validated his regulation 6 that the law imposed the tax for the fiscal year expiring before that date, as a valid construction of the law of Tennessee, appellee takes the position in this Court "that the tax period paid for, or the tax year paid by the July 1st payment was the twelve months period immediately preceding July 1st" (Appellee's brief, page 4).

Appellee's motion to strike states:

> "The appellant's 1950 excise tax year ended December 31st, 1950. The tax payable on net earnings for that tax year was not due until July 1, 1951" (Appellee's motion, page 1).

The two statements quoted above are not consistent.

In the last statement appellee recedes from the position taken in his first brief filed in this Court.

In his last statement he agrees with appellant that the tax sued for herein was paid for the privilege exercised during the fiscal year 1950, which ended before Ch. 6, Acts of 1951, in question here, was enacted, but argues in effect that because the Tennessee law did not require this privilege tax to be paid in advance, the legislature of Tennessee could constitutionally impose this $21,152.03 of additional tax one month after the privilege had been exercised, but five months before the tax for that privilege was due.

However, at the bottom of page 4, he reverts to the position taken in his first brief.

These inconsistencies require consideration of the estoppel invoked.

In support of the motion to strike appellee cites the case of United States v. San Francisco, 310 U. S. 16, 84 L. Ed. 1050.

That case was this. The City of San Francisco had been granted by an Act of Congress the right to take water from the Yosemite National Park and distribute same to domestic and other users in the City. The Act of Congress expressly prohibited the City from selling the water to a private corporation for resale to users of water, and directed the Attorney General of the United States to take proceedings in the name of the United States if the condition was not complied with upon request of the Secretary of the Interior.

For a period of years the City sold this water to a private corporation for resale to consumers.

Finally the Secretary of the Interior requested the City to discontinue violation of the Act of Congress, which it failed to do.

In defense of the Government's suit for injunction the City insisted that the Government was estopped by the acquiescence of the Commissioner of the Interior for a period of years, which estoppel this Court denied.

Clearly, that case has no application here.

Adversary brief also cites R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157, and Gilman Paint & Varnish Co. v. Carson, 190 Tenn. 256, in support.

The first cited case holds that the State is not estopped by an agreement of the Commissioner of Finance and Taxation to waive the payment of taxes imposed by law upon a taxpayer unless the taxpayer can show that injury resulted.

In the second case, the Court held that "the State is not bound by an erroneous opinion of a subordinate employee

of non-tax liability, when, in fact, there is such liability" and since no prejudice resulted.

Neither of these cases support appellee's contention here.

In Davis v. Wakelee, 156 U. S. 681, 39 L. Ed. 579, the fifth headnote is:

> "Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter simply, because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken."

The above holding is supported by the text of 19 Am. Jur., page 704, and the many cases cited in the footnote thereto. These authorities establish the rule that a litigant will not be permitted to change his position in a legal proceeding to the prejudice of his adversary, as appellee sought to do here.

On page 4 of the brief appellee insists that his answer to the petition for clarification in the Court below should not be considered for any purpose because the petition which was answered is not in the record.

Since appellee refused to have the petition for clarification and answer thereto made a part of the record on this appeal, he may not now complain that the petition is not in the record.

Respectfully submitted,

CHAS. C. MOORE,
1324 Hamilton Bank Building,
Chattanooga, Tennessee,
Counsel for Appellant, Penn-Dixie
Cement Corporation.

to revise.

NOVEMBER 24, 1952.

Per Curiam Decision.

No. 408. PENN-DIXIE CEMENT CORP. *v.* DICKINSON, COMMISSIONER OF FINANCE AND TAXATION, ET AL. Appeal from the Supreme Court of Tennessee. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Charles C. Moore* for appellant. *Roy H. Beeler*, Attorney General of Tennessee, and *Allison B. Humphreys*, Solicitor General, for appellees. Reported below: 194 Tenn. 412, 250 S. W. 2d 904.